INDEX.

PAGE

Introduction 1
Opinion below 1
Statement of matter involved 1
Jurisdiction 3
Question presented 3
Reason relied on for allowance of writ 4
1. *The United States Court of Appeals for the Tenth Circuit in refusing to reverse the judgment of the trial court sustaining respondent's Motion for a Summary Judgment, has rendered an important but erroneous decision which should be reviewed here* . . . 4
Conclusion 13

TABLE OF AUTHORITIES.

Barnes, et al., v. Lynch, et al., 9 Okl. 156, 59 Pac. 995 . . 6
Brown v. Durham, 175 Okl. 500, 53 P. (2d) 551 5
Cook v. Sherman, 20 Fed. 167 10
Dow v. United States, 154 F. (2d) 710 7
Martindale v. Shaha, 51 Okl. 670, 151 Pac. 1019 . . . . . 7, 8
Planters' Bank v. Union Bank, 16 Wall. 483 10
Rogers v. Lassiter, 196 Okl. 228, 164 P. (2d) 636 . . . . 7, 11
Thurlwell, et al., v. Rabbit, et al., 110 Okl. 285, 235 Pac. 923 9

IN THE SUPREME COURT OF THE UNITED STATES.
October Term, 1949.

No. .....

CLAUDE PORTER, *Petitioner,*
vs.
DICK JONES, *Respondent.*

PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

The petitioner, Claude Porter, respectfully prays that a writ of certiorari issue to the United States Court of Appeals, Tenth Circuit, to review the final order of that court entered on the 6th day of September, 1949, denying petitioner's petition for rehearing (R. 67).

Opinion Below.

The opinion of the United States Court of Appeals for the Tenth Circuit appears at R. 47.

Statement of Matter Involved.

The United States Court of Appeals for the Tenth Circuit denied the right of petitioner to recover a money judgment as a balance due under the terms of a written contract appearing as Complainant's Exhibit 1, attached to his com-

plaint in the trial court (R. 4). The services contemplated thereunder to be rendered by petitioner were in connection with certain litigation growing out of the famous Jackson Barnett controversy which for many years raged in the United States Courts in Oklahoma and on appeal to the same Circuit Court of Appeals.

As will be revealed from the complaint, *supra,* and reply of said complainant (R. 9) and under the record in this case, the services out of which the controversy arose were performed by petitioner but respondent contends (R. 5) that petitioner and he entered into an oral contract subsequent to the time of the written contract in which the petitioner agreed to accept compensation in accordance with what should be determined after the litigation had ended, all of which was denied by petitioner.

There is no dispute about the fact that there was paid to the respondent $55,546.84, and that if petitioner was entitled to a one-half part thereof, he should have received $27,623.42, but respondent paid him only $16,500.00, and that if he was entitled to receive one-half, there is still due him the sum of $11,123.42.

The position of the respondent throughout has been that the original contract was void on the theory that it was contrary to public policy as being one wherein he, a lawyer, had agreed to pay petitioner a layman, at that time, moneys received by him, respondent, as an attorney's fee and that even if the contract were not void that he and the petitioner had compromised their differences and that the petitioner had accepted the sum of $16,500.00 in full settlement of all his claims (R. 8).

The petitioner denied throughout that the contract was contrary to public policy and vigorously urged that even

if it were the respondent could not take advantage of his own wrong to the detriment of said petitioner. The trial judge in the United States District Court for the Western District of Oklahoma, the Honorable STEPHEN S. CHANDLER, sitting, sustained the respondent's motion for summary judgment and it was from that decision that the petitioner took his appeal to the United States Court of Appeals for the Tenth Circuit which latter court sustained the conclusion reached by the trial judge.

Jurisdiction.

The judgment or decision of the United States Court of Appeals for the Tenth Circuit denying the appellant there a reversal of the decision of the trial court below, is one in which that court has decided an important question of local law in a way probably in conflict with applicable local decisions and has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

Petitioner is aggrieved by the denial of the United States Court of Appeals for the Tenth Circuit to reverse the judgment of the United States District Court for the Western District of Oklahoma, sustaining in the latter court respondent's motion for a summary judgment.

Question Presented.

Was the United States Court of Appeals for the Tenth Circuit correct in holding that the respondent could be absolved from an equal division of his own unjust enrichment because he, a lawyer, had entered into a contract which if contrary to public policy was so only as to him, and not because of any inhibition so to contract which inhered in

petitioner's status, identity, position or person, since he, the latter, was a layman, at the time.

Reason Relied on for Allowance of Writ.

The United States Court of Appeals for the Tenth Circuit in refusing to reverse the judgment of the trial court sustaining respondent's motion for a summary judgment, has rendered an important, but erroneous decision which should be reviewed here.

Without intending in any manner whatsoever to yield said points or to abandon them as unsound, but because there may be room for genuine differences of opinion as to the law applicable thereto, I shall nevertheless rest this petition for a writ of certiorari on the one point which I have regarded from the beginning as conclusive, and which latter point Judge BRATTON rejects in sixteen lines, or one paragraph, at the very end of the opinion.

I have argued and urged strenuously from the outset of this litigation that regardless of the validity or invalidity of the contract entered into between the parties litigant here, and whether or no it offended against public policy, Jones, a seasoned legal practitioner in 1934, could not take advantage of his own wrong by retaining the fruits of what *he* would call an unlawful arrangement. I have heretofore stated upon many occasions and repeat now that in addition to the foregoing line of thought, if any illegality did inhere in such a contract, it arose solely from the fact that a *lawyer* was inhibited from entering into such a contract but that in no event was a *layman* so circumscribed. In support likewise of such thought I advanced the idea, supported by respectable legal authorities, that courts should be chary in nullifying such contracts, where the result en-

sued that lawyers were given a distinct technical advantage over laymen.

In reaching the result that such legal proposition was not tenable, in the case at bar, Judge BRATTON speaking for the United States Court of Appeals for the Tenth Circuit announced:

> "It is the general rule in Oklahoma that a court will not grant relief to either party when the right is predicated upon a contract which violates public policy. Relief is denied in such a case not for the purpose of protecting either party but because the court will not approve or condone a contract of that kind by assisting in the enforcement of a right under it."

To support such erroneous statement of the law in Oklahoma, the learned Appellate Judge cited the case of *Brown* v. *Durham*, 175 Okl. 500, 53 P. (2d) 551.

Without intending any disrespect to Judge BRATTON, I earnestly submit that said latter case has no application whatsoever to the issues in the case at bar. The syllabus by the court, which after all, under the Oklahoma rule, is the law of the case, reads as follows:

> "A contract between a layman and an attorney whereby the former agrees *to solicit litigation* to be prosecuted by the latter in consideration of the division of the proceeds of the business is void and against public policy. The courts will not supervise division of the proceeds of such an enterprise." (Italics mine.)

Even if it were true that the controlling issue on this appeal were the validity of the contract of June, 1934, or to state the matter another way, if the court was called upon to decide whether said contract would or would not

contravene public policy, this Oklahoma decision would furnish no light whatsoever for the solution of such a question.

I would not be so bold as to argue that in any court, much less in one that is highest in the land, aid should be given to those who seek to enforce contracts that are expressly forbidden by the ethics of our profession, and I should not like to have any member of this Court indulge the inference, even, that I would do this. I assume that all of us who profess to practice law in accord with the high standards of our profession would agree that a contract whose object is *to solicit business for lawyers,* with a division of the proceeds between such a lawyer and a layman, offends against the very fundamental ethics of our profession. I assert, as I indicated at the outset, that no further heed need be given to this phase of the controversy, than to point out the patent error in the opinion that has been filed.

Eight years before statehood in Oklahoma, to-wit, in the year 1899, *the Territorial Supreme Court of Oklahoma,* in the case of *Barnes, et al.,* v. *Lynch, et al.,* 9 Okl. 156, 59 Pac. 995, in the tenth section or subdivision of the syllabus announced that:

> "When an illegal transaction has been consummated, when no court has been called upon to give aid to it, when the proceeds of the illegal transaction have been actually received, and received in that which the law recognizes as having value, and the court is not asked to enforce an illegal contract, and when it is not necessary to invoke the aid of the illegal transaction to establish the right to recover, *the illegal transaction cannot be invoked as a defense or set up as a bar to relief,* to which, upon other legal grounds, the parties to the action may be entitled." (Italics mine.)

In commenting with approval upon the case last above cited, *the State Supreme Court of Oklahoma,* as late as the 4th of December, 1945, in the case of *Rogers* v. *Lassiter,* 196 Okl. 228, 164 P. (2d), page 636 particularly, had the following to say:

> "In that (*sic*) case, as in the instant case, the illegality of the original contract was relied upon to defeat recovery but that court (Territorial Supreme Court) denied the contention and in the body of the opinion at page 193 of 9 Okl., at page 1009 of 59 Pac. used this language:
>
> > 'The rule shown to be applied here has no application. While the contract with Stiles was illegal, it was carried out and effectuated, and the title to the property taken by Barnes and Dalton was, beyond dispute, taken by them for the company, upon consideration paid by it and its members; and it is not necessary for the company to invoke the aid of the illegal contract referred to for the purpose of recovering or asserting their rights here'." (Parenthses mine.)

The Supreme Court of Oklahoma had occasion again to consider this question in *Martindale* v. *Shaha,* 51 Okl. 670, 151 Pac. 1019, *written in 1915,* and not only not modified or questioned since, but cited with approval by Judge Bratton in another case, *Dow* v. *United States,* 154 F. (2d) 710. The controversy in the latter case was one between lawyers, Shaha on the one side, the firm of Deichman and Martindale on the other. Shaha was a lawyer who had been admitted to practice in the United States Court in the Indian Territory prior to statehood, but had never been enrolled as an attorney in the Supreme Court after statehood. He entered into a contract with a client and subsequently associated with him the firm above named. The firm collected the fee and refused to account to Shaha.

Deichman and Martindale contended that since Shaha was not an attorney admitted to practice in the Supreme Court of Oklahoma, and since his name did not appear in the contract wherein the client agreed to pay a certain percentage of the value of the property she should receive, as attorney fees, and that such a contract being against public policy and void, and since Shaha was a party to such void contract, he could not maintain an action in court to enforce his rights growing out of it. In the body of the opinion (page 1022), the highest court in Oklahoma stated the question succinctly as follows:

> "Even if the contract under which these fees were collected was void, it having been performed and the money accumulated under it, Deichman and Martindale cannot defend this action on that ground."

In commenting upon the conduct of Deichman and Martindale in attempting thus to defeat the just claim of their associate, the court rightly pointed out that:

> "* * * the law will compel Deichman and Martindale to deal fairly with their associate counsel, whether they wish to do so or not."

A very interesting and helpful part of the case last above cited is the conclusion thereof where said court disposed of the argument that Shaha, not being a member of the bar of the Supreme Court of the State of Oklahoma, could not share in the fee there involved. At the very end of said opinion and answering the latter defense, the Supreme Court of Oklahoma said that:

> "* * * the right to maintain this action does not depend upon Shaha being an attorney at law duly enrolled; it is an action for money had and received for his benefit, and might be maintained regardless of the

fact of whether he was an attorney at law or *a hod carrier.*" (Italics mine.)

A little later on, namely in the years 1924 and 1925, the appellate court in Oklahoma had another occasion to adjudicate a comparable issue. This occurred in the case of *Thurlwell, et al.*, v. *Rabbit, et al.*, 110 Okl. 285, 235 Pac. 923. In the fourth section of the syllabus or subdivision, of the latter case, this Court said:

> "If it appears that the defendants in a given case have received money or property from the complainants and which belongs to the latter, the same may be recovered without inquiry into the nature of the contract under which such money or property was acquired. The distinction is between enforcing an illegal contract, and asserting title to money and property which has arisen from it."

While the factual situation as indicated from the statement in the syllabus is not in exact conformity with that in the appeal now being considered the principle of law is clear, and is applicable here. I make the latter observation for if this Court will examine the language in the body of the opinion, it will be seen that the Supreme Court of Oklahoma said:

> "* * * the fact that Thurlwell and the other appellants entered into an illegal agreement which, as is disclosed by the record, was without the knowledge or consent of these appellees, should not be permitted to take advantage of the fact that the agreement entered into was void *for,* regardless of its invalidity, it resulted in Faulkner, who was holding the money in trust for the rightful owners, in deliverying same to the appellant, Thurlwell, *and he and the other appellees cannot be permitted to take advantage of their own wrong and plead the invalidity of their own agree-*

ment to the detriment of these appellees, the rightful owners of the fund. And in support of this theory, our attention is called to the case of *Martindale* v. *Shaha* * * *, *a well reasoned opinion citing many authorities in point* * * *." (Italics mine.)

It is likewise not without significance that there was cited with approval in the last case, *Cook* v. *Sherman,* (C. C.) 20 Fed. 167, to the following effect:

> "'Where several persons enter into an illegal contract for their own benefit, and the illegal transaction has been consummated and the proceeds of the enterprise have been actually received and carried to the credit of one of such parties, so that he can maintain an action therefor, without requiring the aid of the illegal transaction to establish his case, he may be entitled to relief'."

And that:

> "'According to this rule, the question in such cases must always be, can the plaintiff maintain his action without enforcing the illegal contract, or, in other words, has he a cause of action independently of the illegal contract? If it appears that the defendants in a given case have received money or property from the complainants, and which belongs to the latter, the same may be recovered without any inquiry into the nature of the contract under which such money or property was acquired. The distinction is between enforcing an illegal contract and asserting title to money and property which has arisen from it'."

This Court in *Planters' Bank* v. *Union Bank,* 16 Wall. 483, had occasion to express itself on this general subject when it said:

> "But when the illegal transaction has been consummated; when no court has been called upon to give

aid to it; when the proceeds of the sale have been actually received, and received in that which the law recognizes as having had value; and when they have been carried to the credit of the plaintiff—the case is different. The court is there not asked to enforce an illegal contract. The plaintiffs do not require the aid of any illegal transaction to establish their case. *It is enough that the defendants have in mind a thing of value that belongs to them.*" (Italics mine.)

The basic fault in the opinion rendered by Judge BRATTON, speaking for the Circuit Court, is the same as that in *Rogers* v. *Lassiter, supra,* which is illustrated by the following language:

"The argument under each of these propositions proceeds upon the erroneous assumption that the contract between Rogers, Adams and Patterson, as second parties, and the Lee heirs, as first parties, is the basis of the instant action. *It is true that the contract was pleaded by the plaintiff and attached as an exhibit to his petition,* but the contract was pleaded and exhibited to show the relation of the parties and to account for the manner in which the defendant came into possession of the money claimed by the plaintiff, as administrator of the estate of Spencer Adams, deceased. The action was not upon this contract, but was clearly disclosed by the petition and the evidence to be an action for money had and received by defendant for plaintiff's use and benefit." (Italics mine.)

To paraphrase the language of the *Rogers* case, the contract between Porter and Jones, admittedly entered into between them in 1934, was pleaded by Porter in his complaint, and attached as an exhibit thereto, but the contract was pleaded and exhibited to show the relation of the parties, and to account for the manner in which Jones came

into possession of the money claimed to be due him, petitioner, from Jones. In other words, the action was in the nature of one for money had and received and was not such an action as would have been pleaded for specific performance, or such other relief as would have made it necessary for the trial court to lend aid to the enforcement of a contract which respondent urges, was contrary to public policy.

While it is true that Judge BRATTON points out that the contract was expressly pleaded, there is nothing in the complaint or otherwise justifying his unsupported conclusion that said contract was, "* * * the basis of his right to recover and (he) stood on it throughout." (Parenthesis mine.)

The very nature of the defense of the respondent should be abhorrent to men of justice and integrity for to explain what was otherwise not explainable when he was denying the existence of the contract of June, 1934, respondent with no more than his own word therefor, denied under oath by petitioner in his reply, contended that "sometime" in 1936, said contract was rescinded and a new oral contract was made. Under the terms of the later contract, if it existed, the respondent according to this theory, could have done more or less as he pleased, and yet he nevertheless paid to his former friend the substantial sum of $16,500.00. To me this has never made and does not now, make sense.

More reasonable on the contrary, is the petitioner's contention set forth in his pleadings, that there was no dispute whatsoever with respect to his right to be paid one-half of the money had and received by Jones, but Jones simply claimed that because he, Jones, was in a higher tax bracket, to pay Porter one-half of said money so had and received by him, would operate to give Porter more than one-half of such proceeds.

The nature of controversy here is one which should cause this Court to do everything in its legitimate power to accord the petitioner the right to try this controversy on the merits, before a jury, for one must not lose sight of the fact that the petitioner has cast his pleadings in such a way as to assure him of a trial before a jury of his peers, if the cause is reversed and remanded.

As I said in my oral argument in answer to Judge BRATTON's question, this is clearly a case where the equitable maxim, *"In pari delicto, conditio defendentis est portior,"* is not applicable.

Conclusion.

In conclusion, may I respectfully urge that this petition for a writ of certiorari be granted in this cause, that oral argument be permitted and that thereafter an opinion be filed in which there is not stated therein that the petitioner is entitled to recover, but that he is entitled to submit his controversy to a jury under proper instructions.

Respectfully submitted,

T. AUSTIN GAVIN,
Attorney for Petitioner.